IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATED: 11/07/2003

CORAM

THE HON□BLE MR.B.SUBHASHAN REDDY, CHIEF JUSTICE
And
THE HON□BLE MR.JUSTICE K.GOVINDARAJAN

W.A.No.2278 of 2003 and W.A.No. 2279 of 2003
and
W.A.M.P.Nos.3313 to 3316 of 2003
and
W.P.Nos.18545, 18835, 18657, 18849, 18850, 18851, 18852, 18941, 19080, 19147 & 19159 of 2003
and
W.P.M.P.Nos.23176, 23504, 23171, 23504, 23557, 23558, 23680, 23574, 23575, 23576, 23577, 23578, 23579, 23580, 23581, 23582, 23583, 23584, 23585, 23709, 23710, 23883, 23957 of 2003

W.A.Nos.2278 & 2279 of 2003 & W.No.18545 of 2003

1. The Government of Tamil Nadu,
Rep. By the Chief Secretary to Govt.,
Fort St.George, Chennai □ 9.
2. The Secretary to Government,
Public and Administrative Reforms Department,
Fort St.George,
Chennai □ 9.
3. The Secretary to Government,
Public Department,
Fort St.George,
Chennai □ 9.
4. The Secretary to Government,
Home Department,
Fort St.George,
Chennai □ 9.
5. The Secretary to Government,
Law Department,
Chennai □ 9.
6. The Director General of Police,
Mylapore,
Chennai □ 4. ..Appellants in both the Writ Appeals.
& Respondents in W.P.18545/03.
-Vs-

The Tamil Nadu Co-operative Subordinate
Officers□ Association,

Rep. by its State President
Mr.P.Dhandapani. ..Respondent in both the Writ Appeals.
& Petitioner in W.P.18545/03.

W.P.No.18835 of 2003

C.Kuppusami,
Member of Parliament,
No.10, Thiyagaraya Street,
North Usman Road,
Chennai 600 017. ..Petitioner

Vs.

1.State of Tamil Nadu,
rep. by its Chief Secretary to Govt.,
Fort St.George,
Chennai 600 009.
2.Secretary to Government of Tamil Nadu,
Law Department,
Fort St.George,
Chennai 600 009. ..Respondents.

W.P.No.18657 of 2003

K.R.Ramaswamy @ Traffic Ramaswamy ..Petitioner.

Vs.

1.The State Government of Tamil Nadu
Rep. by its Chief Secretary,
Government of Tamil Nadu,
Fort St.George, Chennai 9.

2.Secretary to Public Department,
Government of Tamil Nadu,
Chennai 9.

3. Secretary to Education Department,
Government of Tamil Nadu,
Fort St.George,
Chennai 9. ..Respondents.

W.P.No.18849 of 2003

All India Trade Union Congress,

Rep. by its General Secretary,
Tamil Nadu Unit,
No.25, Kovur Vidyanathan Street,
Chindadripet, Chennai 2. ..Petitioner.

Vs.
State of Tamil Nadu,
Rep. by its Chief Secretary to Government,
Fort St.George,
Chennai 9. ..Respondent.

W.P.No.18850 of 2003

Thamilaga Aramba palli Aasiriar Kootany,
Rep. by its Secretary I/c Dayalan,
52, Mayor Chitty Babu Street,
Triplicane, Chennai 2. ..Petitioner.

Vs.

State of Tamil Nadu,
Rep. by its Chief Secretary to Government,
Fort St.George,
Chennai 9. ..Respondent.

W.P.No.18851 of 2003

Tamil Nadu Secretariat Officers Association,
Rep. by its President,
Secretariat,
Fort St.George,
Chennai 9. ..Petitioner.

Vs.

1.The State of Tamil Nadu,
rep. by its Secretary to Govt.,
Department of Home,
Fort St.George,
Chennai 600 009.
2.The Chief Secretary,
Government of Tamil Nadu,
Fort St.George,
Chennai 600 009.
3.Secretary to Government,
Personnel and Administrative Reforms Department,
Government of Tamil Nadu,
Fort St.George,

Chennai 600 009.
4.Secretary to Government,
Public Department,
Government of Tamil Nadu,
Fort St.George,
Chennai 600 009. ..Respondents.

W.P.No.18852 of 2003

S.Namasivayam,
W 5 19th Street,
Anna Nagar Western Extension,
Chennai 101. ..Petitioner.

Vs.
1.Government of Tamil Nadu,
rep. by its Chief Secretary to Government,
Fort St.George,
Chennai 600 009.
2.The Secretary to Government,
Law Department,
Fort St.George,
Chennai 9.
3.The Secretary to Government,
Personnel and Administrative Reforms Dept.,
Fort St.George,
Chennai 9.
4.The Secretary to Government,
Finance Department,
Fort St.George,
Chennai 9.
5.The Secretary to Government,
Home Department,
Fort St.George,
Chennai 9.
6.The Secretary to Government,
Legislative Assembly,
Secretariat,
Chennai 9.
7.The Director General of Police,
Chennai 4.
8.The Commissioner of Police,
Chennai 8. ..Respondents.

W.P.No.18941 of 2003

T.K.Rangarajan,
Vice president,
Tamil Nadu State Transport Employees Federation,
52, Cooks Road,
Chennai 12. ..Petitioner.

Vs.
1.The Government of Tamil Nadu,
rep. by its Chief Secretary,
Secretariat,
Chennai 600 009.
2.The Secretary,
Law Department,
Government of Tamil Nadu,
Secretariat,
Chennai 9.
3.The Secretary,
Home Department,
Government of Tamil Nadu,
Secretariat,
Chennai 9. ..Respondents.

W.P.No.19080 of 2003

G.Purushothaman
H 101/G2, Sea View Apartments,
1st Sea Ward Road, Valmiki Nagar,
Thiruvanmiyur,
Chennai 41. ..Petitioner.

Vs.
1.State of Tamil Nadu,
rep. by the Chief Secretary to Government,
Fort St.George, Chennai 9.
2.Secretary to Government of Tamil Nadu,
Law Department, Fort St.George,
Chennai 9. ..Respondents.

W.P.No.19147 of 2003

T.Velmurugan
63, Nattumuthunaicken St.,
Teynampet,
Chennai. ..Petitioner.

Vs.

1.Government of Tamil Nadu,
rep. by its Chief Secretary,
Secretariat,
Chennai 9.

2.The Secretary,
Law Department,
Government of Tamil Nadu,
Secretariat,
Chennai 9.
3.The Secretary,
Home Department,

Government of Tamil Nadu,
Secretariat,
Chennai 9. ..Respondents.

W.P.No.19159 of 2003
1.Era.Mathivanan
2.V.Karuppasamy
3.R.Krishnan
4.M.S.Pasupathi
5.L.Balan
6.S.George Alexander
7.M.Chelladurai
8.S.Pauldurai
9.C.Nagarajan
10.P.Sumathi
11.G.Kamala
12.D.Sakunthala
13.S.Tamil Selvi
14.N.Sundara Moorthy
15.M.Jeevanantham ..Petitioners.

Vs.

1.The State of Tamil Nadu,
rep. by its Secretary to Government,
Department of Home,
Fort St.George,
Chennai 9.
2.The Chief Secretary,
Government of Tamil Nadu,
Fort St.George,
Chennai 9.
3.Secretary to Govt. of Tamil Nadu,
Personal and Administrative Reforms Department,
Govt. of Tamil Nadu,
Fort St.George,
Chennai 9.
4.Secretary to Govt.,
Public Department,
Govt. of Tamil Nadu,
Fort St.George,

Chennai 9. .. Respondents.

PRAYER: Appeals against the common interim order passed by the learned single Judge dated 6.7.2003, passed in W.P.M.P. Nos.23170 and 23171 of 2003 in W.P.No.18545 of 2003, and writ petitions praying for the issuance of writ of mandamus and other directions, as stated therein.

Writ Petitions filed under Article 226 of the Constitution of India, for the issuance of a writ of mandamus and other directions as stated therein.

!For Appellants in both
writ appeals and Respondents
in all the Writ Petitions. : Mr. N.R. Chandran,
Advocate General assisted by Mr.V.Raghupathy
Government Pleader
Assisted by Mr.D.Krishnakumar
Spl. Govt. Pleader.

^For Respondent in both the : Mr.S.M.Subramaniam
Writ Appeals & Petitioner in
W.P.18545/03.

Mr.R.Viduthalai : For Petitioner in W.P. No. 18835
of 2003.

Mr.K.Chandru, Senior Counsel : For Petitioner in W.P.Ns. For Mr.R.Ganesan
18849 & 18850/2003.

Mrs.Nalini Chidambaram, : For Petitioenr in W.P.18851 Senior Counsel of
2003. For M/s.S.Silambanan

Mr.T.R.Rajagopalan, : For Petitioner in W.P.18852 Senior Counsel
of 2003. For M/s.A.V.K.Ezhilmani

Mr.N.G.R.Prasad : For Petitioner in W.P.18941 For M/s.Row &
Reddy of 2003

Mr.G.Purushothaman : For Petitioner in W.P.19080 Party in
Person of 2003.

Mr.K.Balu : For Petitioner in W.P.19147 of
2003.

Mr.P.Wilson : For Petitioner in W.P.19159 of
2003.

K.R.Ramasamy : Party-in-Person in W.P.18657 of 2003.

:J U D G M E N T

THE HON□BLE THE CHIEF JUSTICE

At issue, is the constitutionality of the Tamil Nadu Essential Services Maintenance Act, 2002, as also the Tamil Nadu Ordinance No.3 of 2003, and the consequential actions of dismissals and arrests, made there under. The above Act and Ordinance are hereinafter referred to as the Act and the Ordinance. The Act was enacted and was brought into force w.e.f. 1.10.2002. Section 3(1) of the Act enables the Government to impose ban on strikes in essential services, as may be notified, and after the imposition of such ban, any strike, in essential services, is treated as illegal and also a crime rendering the strikers punishable for the said crime, apart from the disciplinary actions, and even the instigators and financiers are punishable for the crime as abettors.

2. The Government had evolved a policy and issued G.O.Ms.Nos.71, 72, 73, 74 and 75, all dated 19.03.2003, by which the pensioners□ rights are slightly affected, touching upon their qualifying service, basis of computation of emoluments, earned leave en-cashments, commutation, basis of computation of such commutation, and also the quantum of cash payment towards gratuity amount as immediate cash payment is restricted to 50% by deferring the balance of 50% by issuance of Small Savings Certificates to be encashed after the period of their maturity. It is needless to mention that there are several associations of employees and they made representations to the Government to withdraw the above Government Orders, but the Government did not consider their demand to review its decision, and then the employees□ Associations passed resolutions deciding to strike work, until their demands are accepted by the Government. Then the Government issued notification dated 23.4.2003, which reads thus: Abstract Essential Services □ Maintenance of Essential Services □ Prohibiting strikes in certain essential services, public

services and posts in connection with the affairs of the State □ Order under sub-section (1) of Section 3 of the Tamil Nadu Essential Services Maintenance Act, 2002 □ Notified. PUBLIC (SC) DEPARTMENT

G.O.Ms.No.415 Dated: 23.04.2003 Read

ORDER

The following notification will be published in the Tamil Nadu Government Gazette Extraordinary, dated 23.04.2003:

NOTIFICATION WHEREAS a section of the members of the essential services

specified in the Annexure to this order have announced various modes of agitation which includes strike; AND WHEREAS the Government is satisfied that in the public interest and in the interest of public order, it is necessary to prohibit strike in the said essential services; NOW, THEREFORE, in exercise of the powers conferred by sub-section (1) of section 3 of the Tamil Nadu Essential Services Maintenance Act, 2002 (Tamil Nadu Act 36 of 2002), the Governor of Tamil Nadu hereby prohibits strike in the essential services, specified in the Annexure to this order, from the date of publication of this Notification in the Tamil Nadu Government Gazette.

(BY ORDER OF THE GOVERNOR)
LAKSHMI PRANESH
CHIEF SECRETARY TO GOVT.

3. The said order has been passed in exercise of powers conferred under Sub Section (1) of Section 3 of the Act. When the employees struck work on 1st July 2003, and continued the following days, the Government had invoked the provisions of the Act and made arrests and also initiated disciplinary actions. On 4.7.2003 W.P.No.18545 of 2003 was filed questioning the validity of the Act. Notices were issued by the learned single Judge on the same day, and the matter was posted to 7.7.2003. Meanwhile, late in the day of 4.7.2003, the Government has promulgated the ordinance by amending Section 7 of the Act and substituting an entirely new provision, dispensing with the audi alterm partem rule for inflicting penalties varying from dismissal to break in service. Residence motion was moved before the learned single Judge on 5.7.2003 questioning the same, and seeking urgent orders. After hearing the parties, the learned single Judge directed the learned Advocate General to seek instructions from the Government as to why the plea of the strikers to withdraw the strike and resumption to duty cannot be considered by the Government, by withdrawing the proceedings relating to disciplinary actions and prosecution. The matter came up on 6.7.2003, and after the learned Advocate General reported to the learned single Judge that any decision by the Government would be taken only on Wednesday i.e., 7.7.2003, but the learned single Judge felt urgency, and after considering the contentions on either side the learned single Judge has passed the order in W.P.M.P.Nos.23170 and 23171 of 2003 in W.P.18545 of 2003. The relief portion is contained in paragraph □ 19 of the said order, and the same reads as follows:
□Para-19 : For all these reasons, I am inclined to: (i) direct the respondents to release all the Government servants forthwith irrespective of whether they are members of the petitioner association or not, who are arrested for the alleged offence punishable under Sections 4 and 5 of the Act, on condition that they give an undertaking before the Police Station or the Jail authority concerned that they will not either instigate, incite other persons to participate in the strike and that they would not involve themselves in any act hereafter which would otherwise attract Sections 4 and 5 of the Act. This, of course, will not be applicable in the case of the persons against whom the cases are registered under the Tamil Nadu Public Property (Prevention of Damage and Loss) Act, 1992. The sixth respondent is directed to give effect to this direction with immediate effect; (ii) all the orders of suspension and dismissal of the alleged erred Government Servants, made without conducting any enquiry shall be kept in abeyance until further

orders of this Court and they shall be permitted to join duty forthwith in view of their undertaking given before this Court on 5.7.2003 to withdraw the strike and resume duty; (iii) the respondents shall not fill up the post held by the alleged erred Government servants against whom order of suspension or order of dismissal are pending without enquiry; (iv) the above interim directions will be applicable to only those Government servants who withdraw the strike unconditionally and join duty forthwith ; and (v) these above interim orders shall not stand on the way of the Government to take appropriate decision; i. in considering the grievance of the petitioners with regard to (a) the withdrawal of the criminal cases filed against them; (b) the withdrawal of order of suspension; and (c) the withdrawal of orders of dismissal; and ii. the Government on the representation of the Government Servants and their associations, is at liberty to resolve the issues raised by negotiations amicably, pending disposal of the above writ petition.

4. Then the learned single Judge has directed the matter to be posted before the Division Bench on 07.07.2003, but the Government thought that it was a matter of urgency, and residence motion was moved before the Chief Justice by filing writ appeals, and the Division Bench was constituted to hear the same. The Division Bench admitted the writ appeals and suspended the operation of the order of the learned single Judge, and posted the matters next day.

5. As the matters are being heard from 7.7.2003, there was a spate of writ petitions. The above two writ appeals are directed against the interim orders passed in W.P.No.18545 of 2003. The other writ petitions are filed challenging the vires of the Act or the Ordinance or both, with one exception in W.P.No.18657 of 2003, which has been filed by a Party-in-Person, seeking a mandamus directing the Government authorities to declare the strike as illegal and unconstitutional. In W.P.No.18851 of 2003 apart from questioning the Ordinance, the consequential orders of dismissal of employees are sought to be quashed, with directions to reinstate the said employees by setting at naught punishments inflicted by way of disciplinary action.

6. In W.P.No.18941 of 2003 both the Act and the Ordinance are challenged and further seeks to set aside the arrests made and the dismissal orders passed against the employees.

7. The matters were heard, and the learned counsel M/s..S.M.Subramaniam, Nalini Chidambaram, R.Viduthalai, K.Chandru, T.R.Rajagopalan, N.G.R.Prasad, R.Vaigai, K.Balu and P.Wilson appeared for the petitioners questioning the Act, Ordinance and the consequential action by the authorities, while Mr.K.Ramaswamy a Party in Person has supported the Act and the Ordinance and sought for the issuance of mandamus to enforce the same in his Writ Petition No.18657 of 2003.

8. Mr.N.R.Chandran, learned Advocate General defended the validity of the Act, Ordinance and the actions taken by the authorities.

9. Mr.S.M.Subramaniam, learned counsel for the petitioner in W.P.No.18545 of 2003, submits that the strikers repented striking work, that

they have stated before the learned single Judge offering to withdraw the strike, that there was no reason for the Government to reject the said offer, that when the matter was in the process of hearing, the issuance of Ordinance was uncalled for, that there was also no such urgency to issue the Ordinance, that the number of dismissals of employees swelled from 4,300 on 4.7.2003 to one lakh on 5.7.2003 and 3 lakhs on 7.7.2003, and further went up to 4 lakhs on the following day, and that the recourse to High Court under Article 226 is the only remedy, as the State Administrative Tribunal is functioning only with the Vice Chairman, and the constitutional validity of the Act or the Ordinance cannot be challenged before the said forum. He also submits that apart from the above arbitrary dismissals, the employees and their family members are sought to be evicted from the government quarters in their occupation, and if such arbitrary and capricious act is not immediately stayed, then lakhs of employees with their multifold families would be rendered homeless.

10. Mrs.Nalini Chidambaram, the learned Senior Counsel appearing for the petitioner in W.P.No.18851 of 2003 invoked the doctrine of necessity for the same reason that one member State Administrative Tribunal cannot entertain a lis of this nature. She also raised a point that the lis is not related to the service conditions of the employees, and the impugned Act and Ordinance are only traceable to entry 3 of List III of Schedue VII of the Constitution and as there is no Presidential assent for the Ordinance, the Ordinance is unconstitutional and is bad. She also submits that the Audi Alteram Partem Rule embedded in Article 311 for employees facing dismissal orders have been grossly violated and that the ordinance does not attract the essentials required for the exceptions provided in 2nd proviso to Clause (2) of Article 311 of the Constitution of India. She further submits that apart from the handicap the Tribunal is facing with only one Vice Chairman as a Presiding Member, the public interest litigation cannot be entertained by the Tribunal and on that count also the writ petitions are maintainable, as they have been filed as public interest litigations. She further submits that the post-decisional hearing is an empty formality, and the appropriate forum is ineffective, and that in any event the punishments proposed and that too en masse dismissals, even without verifying the gravity in each of the cases is grossly disproportionate. Lastly, she submits that the Ordinance is hit by legal mala fides.

11. Mr.R.Viduthalai, the learned counsel submits that the petitioner is a Parliamentarian and concerned with the governmental action and contends that the impugned Act and Ordinance and consequent dismissals and arrests are all violative of the fundamental rights guaranteed under Articles 14 and 21 of the Indian Constitution and also of the constitutional provisions envisaged in Articles 309, 311 of the Constitution of India. He further submits that the legislation particularly Ordinance is referable to entries 1, 2, and 3 of the Concurrent List and require prior assent of the President, and that Ordinance having not been sent to the President for assent is per se unconstitutional. He also submits that the very fact that the Act was sent for assent of the President, makes it ex facie clear that any amendment thereto also requires Presidential assent, and the Ordinance has been issued hurriedly only as a

vindictive measure, even though the State Government fully knew that the Ordinance require Presidential assent. He further submits that no retrospectivity can be given to the Ordinance, as new rights are created in the Government and the obligations against the employees.

12. Mr.K.Chandru, learned Senior Counsel submits that before the promulgation of Ordinance only criminal liability was imposed under Sections 4, 5, and 6 of the Act, and Section 7 of the Act only mentions that the Act was in addition to the service rules, which were already in force and by the issuance of the Ordinance the presumption of strike and the punishment there of are introduced, that the dicta laid down by the Supreme Court in L.Chandra Kumar's Case is inapplicable and that in any event the administrative tribunal is not competent to hear the matter as there is only one Vice Chairman presiding over the matters and he is not entitled to test the constitutionality of the Act and the Ordinance. He also submits that the Ordinance is violative of Article 20 of the Constitution of India, because of the retrospectivity given to the Ordinance w.e.f. 23.4.2003. The learned Senior Counsel lastly submits that setting aside all the technicalities regarding the exhaustion of alternative remedy, an extraordinary situation has arisen because of the dismissal of lakhs of employees and arrests of more than 2000 of them, and this extraordinary situation warrants invocation by this Court of its extraordinary jurisdiction under Article 226 of the Constitution of India.

13. Mr.T.R.Rajagopalan, learned Senior Counsel contends that the arrests were illegal and a call given by the Government to call off the strike and attend the duties could not be complied with by the arrestees, as they were in judicial remand and that in fact there are no individual complaints and the arrests were made en masse without passing any individual orders. The learned Senior Counsel further submits that even assuming that the State Administrative Tribunal has to be approached first, the remedy is not efficacious, as already 60000 cases are pending with one member (Vice Chairman) to decide the same, and if this many dismissed employees have to invoke the jurisdiction of the Tribunal, then even 20 years are not sufficient for adjudication of their cases, and that circumstance itself is sufficient ground for the invocation of this Court's power under Article 226 of Constitution of India.

14. Mr.N.G.R.Prasad, learned counsel submits that the Act and the Ordinance are violative of Article 14 of the Constitution of India, amounting to legislative despotism imposing legislative conviction and doing away the pre-decisional hearing and making post-decisional hearing a mockery and robbing the striker of opportunity to explain and that the Act runs contra to the provisions of the Industrial Disputes Act, 1947 and particularly, Section 22 there of, and the strike in the Industrial Disputes Act is not illegal while it is per se made illegal and criminal, under the Act and the Ordinance. He also submits that Article 311 of the Indian Constitution is grossly violated.

15. Ms.Vaigai, learned counsel submits that the State of Tamil Nadu has already taken a decision to abolish the administrative tribunal and

conveyed it to the Central Government, and the tribunal is no more to continue, and apart from the fact that a single member of the tribunal cannot adjudicate upon the constitutionality of the Act and the Ordinance, there is no bar for entertaining the writ petition directly and cited the judgment of the Supreme Court reported in 1997 (10) SCC 663 and particularly referring to paragraph-6 thereof.

16. Mr.N.R.Chandran, learned Advocate General appearing for the State and its authorities counters the arguments of the learned counsel appearing for the different petitioners, stating that associations cannot maintain writ petitions and only affected individual employees are entitled to espouse their cause by filing individual writ petitions, and that public interest litigations cannot be maintainable in service matters and the administrative tribunal cannot be bye passed, merely because the PILs are not maintainable before the tribunal and as the administrative tribunal has been constituted for the State to deal with the service matters and is still continuing even with one member, it cannot be said that there is no tribunal at all and so long as even that member, who is the Vice Chairman and retired Judge of this Court, functions and till the abolition of the tribunal, this Court's jurisdiction in service matters is barred until the remedies are first exhausted before the tribunal. The learned Advocate General heavily relies upon the Judgment of the Supreme Court in L.Chandrakumar's Case (supra), as also the later Judgment of the Supreme Court reported in 2002 (4) SCC 145. He submits that Section 7 of the Ordinance only covers the government servants and not others and there is no material before this Court that persons not covered by the Act and the Ordinance have been subjected to either disciplinary or penal action. He further submits that the Act and the Ordinance are referable only to entries 41 and 64 of List-II of Schedule-VII, and the President's assent was obtained for the Act only as a precautionary measure, and that in any event as the Ordinance does not entrench upon the legislative field in Concurrent List, it is not vitiated for the lack of President's assent. He also submits that no arrests have been after the observations made by the learned single Judge during the course of hearing on 4th and 5th July, 2003 and that no action will be taken by the Government and by its authorities to evict any of the government servants from the government quarters they are occupying. He further submits that the Act and the Ordinance do not suffer from any constitutional infirmities, and that the dismissal orders passed and the arrests made have to be challenged individually before the authorities as specified, and in fact whoever has filed bail petitions have been released on bail and the bail pleas were not even contested and other arrestees did not even file bail petitions. In answering the plea of Mrs.Nalini Chidambaram, learned Senior Counsel to invoke the doctrine of necessity, the learned Advocate General submits that in fact the doctrine of necessity lies otherwise as even assuming that a single member bench of the administrative tribunal cannot adjudicate upon the validity of the legislative action, be it Act or Ordinance, there being no chance of another member being appointed, applying the doctrine of necessity, the single member administrative tribunal consisting of only a Vice Chairman, has got to dispose of matters of any nature including the matters questioning the constitutionality of the Act and the Ordinance, and cites ILR 1994 (2) Madras 935, in support of his contention. Lastly, he submits that the government's

action is not vindictive as this is not the first time that the employees are striking the work, but however much the Government was lax and lenient in considering and acceding to the demands of the employees, the employees were never satisfied with the concessions made by the Government and time and again, they were holding threats of striking the work, and in fact, did on some occasions, and that the Government had eventually felt that the time has come to discipline the employees and only as a last resort took measures for the enactment of the Act and the promulgation of the Ordinance, and it would consider the matters in individual cases on applications being filed to annul the punishments of dismissal inflicted on them, basing on the evidence placed on record and that the Government neither acted arbitrarily nor capriciously and actions of Government are in good spirit and keeping in view the larger public interest.

17. Plethora of precedents have been cited on either side in support of their contentions. But, insofar as the facts are concerned they are general and bereft of particulars with regard to each of the employees and particularly, there is nothing demonstrated to show that any employee not attracted by the provisions of Administrative Tribunals Act is either detained in prison or dismissed from service.

18. From the submissions on either side, the following contentious issues emerge for consideration: (a) Whether the writ petitions are maintainable without exhaustion of remedies before the State Administrative Tribunal; (b) Whether the impugned Act lacks in legislative competence or violative of fundamental rights guaranteed in Articles 14, and 20 of the Constitution of India or the constitutional rights provided in Articles 309 and 311 of the Constitution of India; (c) Whether the impugned Ordinance is bad for want of Presidential assent and even if the said assent is not required is it valid on the touchstone of the fundamental rights, legislative competence and the constitutional safety with regard to dismissals as provided under Article 311 of the Indian Constitution.

19. Of the above contentious issues, we are obliged to address the first issue first, as it touches upon the jurisdiction of this Court to entertain the writ petitions directly without intervention of the State Administrative Tribunal. If the answer is in the affirmative, then a need arises to address on other issues, but not otherwise, as the cardinal principles of law are that once the Court holds that it has no jurisdiction to entertain the cause, then it is precluded from addressing on the merits thereof. Hence, we proceed to deal with the first issue.

20. Articles 226 and 227 of the Constitution of India provide constitutional remedies. Writs are issued under Article 226 of the Constitution of India and such power conferred is extraordinary in nature and has to be exercised not as an ordinary measure but only for enforcing public remedies. Protection of fundamental rights and enforcement thereof fall within the realm of public remedies and existence of alternative remedy is no answer against exercise of powers by the High Courts. Apart from the violation of fundamental rights, the High Court□s intervention is warranted in case of violation of other constitutional rights, for instance, Articles 300A

and 311 of the Constitution of India. The High Courts can also interfere by issuance of writs, where the actions of statutory authorities or other authorities coming within the definition of Article 12 of the Indian Constitution are assailed to be devoid of jurisdiction or in violation of the audi alteram partem rule. The High Court's intervention may be necessary even in cases where the alternative remedy available is either ineffective or entails in delay. No specific restriction is placed on the exercise of the jurisdiction by the High Courts for issuance of writs and it is for the High Court to practice self-restraint while dealing with the issuance of writs or directions in exercise of the powers under Article 226 of the Constitution of India. But what is stated supra is applicable only when the jurisdiction is vested in the High Court and not when its jurisdiction is excluded. By that, we do not mean that the plenary powers conferred on the High Courts by the constitutional makers under Article 226 of the Constitution of India or for that reason Article 227 thereof can be taken away by any statute. But they can be taken away by the constitution amendment was the verdict given by the Five-Judge Constitutional Bench of the Supreme Court in S.V.Sampath Kumar Vs. Union of India (AIR 1987 SC 386). We may state the origin leading to the above adjudication.

21. Article 323-A was introduced by Constitution (42nd Amendment) Act, 1976, which came into force from 3.1.1977 enabling the Parliament to make law providing adjudication by administrative tribunals of disputes and complaints with respect to recruitment and conditions of service of persons appointed to public services and posts in connection with the affairs of the Union or of any State or of any Local Authority or other Authority within the territory of India or under the control of the Government of India or of any Corporation owned or controlled by the Government to the exclusion of the High Courts. Consequently, the Parliament had enacted Administrative Tribunals Act, 1985. Section 14 of the above Act deals with the setting up of Central Administrative Tribunals for Central Services and Section 15 for State Services. Enactment of 42nd Constitutional Amendment Act incorporating Article 323-A and the consequent Administrative Tribunals Act, 1985 were assailed before the Supreme Court in S.V.Sampath Kumar Vs. Union of India (AIR 1987 SC 386) and a Five-Judge Constitutional Bench of the Supreme Court of India upheld the constitutional validity of the above enactments while making some suggestions which have been accepted by the Central Government. Consequently, amendments were made. The Supreme Court ruled that exclusion of jurisdiction of High Court under Articles 226 and 227 of the Constitution of India in service matters is valid, as an efficient alternative institutional mechanism has been provided by setting up of the Administrative Tribunals and the said Administrative Tribunals function as substituted authorities for judicial review in service matters in place of the High Courts. Because of the said authoritative pronouncement, High Courts were precluded from entertaining any dispute for adjudication relating to service matters and they were being dealt with by the administrative tribunals, at the places they have been set up. This continued for a decade and then came another Seven-Judge Constitutional Bench Judgment in L.Chandrakumar Vs. Union of India and Others (AIR 1997 SC 1125), striking a different note but retaining the original jurisdiction of the administrative tribunals to deal with the service matters. While in Sampathkumar's case (1st supra) the Supreme Court held that the

administrative tribunals, which are set up, act as substitutes for the High Courts to the total exclusion of the jurisdiction of the High Courts in service matters, L.Chandrakumar's case (2nd supra) took a view that the role of the administrative tribunals is only supplemental and they are not substitutes of High Courts and the tribunals act as primary authority, after which their decisions can be scrutinized by the High Court in exercise of powers of judicial review under Articles 226 and 227 of the Constitution of India. In effect, the jurisdiction of the High Courts to exercise the powers of judicial review has been restored, but with a condition that the High Court shall not entertain any matter relating to service disputes unless the remedy is first exhausted before the administrative tribunals. The argument that the administrative tribunals cannot test the legislative action was repelled by the Supreme Court, and we feel it apt to extract what the Supreme Court said in paragraph 93 of its Judgment. 'Before moving on to other aspects, we may summarise our conclusions of the jurisdictional powers of these Tribunals. The Tribunals are competent to hear matters where the vires of statutory provisions are questioned. However, in discharging this duty, they cannot act as substitutes for the High Courts and the Supreme Court which under our constitutional set up, been specifically entrusted with such an obligation. Their function in this respect is only supplementary and all such decisions of the Tribunals will be subject to scrutiny before a Division Bench of the respective High Courts. The Tribunals will consequently also have the power to test the vires of subordinate legislations and rules. However, this power of the Tribunals will be subject to one important exception. The Tribunals shall not entertain any question regarding the vires of their parent statutes following the settled principle that a Tribunal which is a creature of an Act cannot declare that very Act to be unconstitutional. In such cases alone, the concerned High Court may be approached directly. All other decisions of these Tribunals, rendered in cases that they are specifically empowered to adjudicate upon by virtue of their parent statutes, will also be subject to scrutiny before a Division Bench of their respective High Court. We may add that the Tribunals will, however, continue to act as the only Courts of first instance in respect of the areas of law for which they have been constituted. By this, we mean that it will not be open for litigants to directly approach the High Courts even in cases where they question the vires of statutory legislations (except, as mentioned, where the legislation which creates the particular Tribunal is challenged) by overlooking the jurisdiction of the concerned Tribunal. (Emphasis is ours).

22. No exception are provided by the Supreme Court in L.Chandra Kumar's Case (2nd supra) to skip the administrative tribunal and make a direct approach to the High Court. But, all the learned counsel for the petitioners argued in one voice relying upon the observations of the Supreme Court in paragraph-98 in L.Chandrakumar's judgment (2nd supra) in support of their plea that one member (Vice Chairman), even if he is a retired Judge of this Court would not satisfy the requirement of hearing the matter by a Division Bench, because of the challenge of the constitutional vires of the Act and the Ordinance. There, the Supreme Court was dealing with the interpretation to be given to Sections 5(2) and 5(6) of the Administrative Tribunals Act, and particularly, in the context of what has been stated in a previous Supreme Court Judgment in Dr.Mahabal Ram's Case3 (1994 (2) SCC 401). Apart from

Dr.Mahabal Ram's case (3rd supra) yet another Judgment, which is relevant to be mentioned and that is Amulya Chandra Kalita Vs. Union of India and Others (1991 (1) SCC 181) 4 . There the interpretation of Section 5(2) of the Administrative Tribunals Act came up for consideration and the Supreme Court held that the matter therein pertain to transfer and decided by a single Bench consisting of an administrative member was invalid, as only Division Bench consisting of both judicial member and administrative member should have decided and on that count the order of the Central Administrative Tribunal was set aside and the matter was remitted back. Sub Section (6) of Section 5 of the Administrative Tribunals Act was not cited for consideration. In Dr.Mahabal Rams Case (3rd supra) decided by the Supreme Court, which also related to transfer and in which dispute was decided by the single member of the Central Administrative Tribunal, the impact of Sub Section (6) of Section 5 of the Administrative Tribunals Act vis a vis Sub Section (2) of Section 5 was considered, and it was held that both the sub sections have to be harmoniously construed, and it would be open to either party appearing before the single member to suggest that the matter be referred to the bench of 2 members and on such request the member should ordinarily allow the matter to go to the bench of 2 members, and in that way sufficient protection is afforded.

23. The said view was affirmed by the Supreme Court in L.Chandrakumar's case (2nd supra) in paragraph 98 thereof, further adding "we shall, to make it clear that whether a question involving interpretation of a statutory provision or rule in relation to the Constitution arises for consideration of a single member bench of the administrative tribunal, the proviso to Section 5(6) will automatically apply and the Chairman or the Member concerned shall refer the matter to the Bench consisting of atleast 2 members, one of whom must be of judicial member. This will ensure that questions involving the vires of a statutory provision or rule will never arise for adjudication before a single member bench or a bench which does not consist of a judicial member. So construed, Section 5(6) will no longer be susceptible to charges of unconstitutionality."

24. In view of the above emphatic statement of legal principles revolving around Sections 5(6) of the Administrative Tribunals Act, we cannot accede to the contention of the learned Advocate General that the above statement of the Supreme Court is not a statement of legal principles, but have to be read as mere observations not amounting to obiter dicta.

25. Now, there is a piquant situation. On one side there is a mandate by the Supreme Court in L.Chandrakumar's case (2nd supra) that the High Court is not entitled to entertain any matter relating to service until the exhaustion of the remedy firstly before the administrative tribunal, and on the other the same judgment enunciated a legal principle that when a constitutional validity of an Act or Ordinance or Rule is challenged before the Administrative Tribunal, then only a Division Bench should hear such matters. Now, the Tamil Nadu State Administrative Tribunal has a lone member viz., Justice I.David Christian, a retired Judge of this Court. He was appointed as the Vice Chairman, and as the previous Chairman has retired

during last year and nobody having been appointed in his place, the above Vice Chairman is treated as Chairman by virtue of Section 7(1) of the Administrative Tribunals Act. It is needless to mention that there is no other members either judicial or administrative as on date. Now, the question arises as to whether we should ignore the very existence of the Tribunal, merely because there is only one member manning the tribunal, whether described as Vice Chairman or Chairman, as the case may be. This situation did not arise in the cases decided by the Supreme Court earlier, as such we have to understand the judgment of the Supreme Court in L.Chandrakumar's case (2nd supra), as also Dr.Mahabal Ram's case (3rd supra) that only if there is more than one member then seeking a reference to a division bench for adjudication shall arise, but not when there is a sole adjudicator as is in the instant case. This is more so, because sub section (6) of Section 5 of the Administrative Tribunals Act is still in the statute book, and the Vice Chairman, who is the Chairman, is the only person who can hear and dispose of the cases and there being none else, the question of seeking reference to Division Bench does not arise at all and the proviso to sub section (6) of Section 5 of the Administrative Tribunals Act is inapplicable. That apart, the stress is on the participation of a judicial member in matters involving adjudication of lis, questioning the vires of statutory provisions, and that is basing upon the observations of the Supreme Court in Sampathkumar's case (1st supra), and upheld in Dr.Mahabal Ram's case(3rd supra) and further approved by a larger Bench of the Supreme Court in L.Chandrakumar's case (2nd supra), and which reads thus: "It is necessary to bear in mind that service matters which are removed from the jurisdiction of the High Court under Articles 226 and 227 of the Constitution and entrusted to the Administrative Tribunal set up under the impugned Act for adjudication involve questions of interpretation and applicability of Articles 14, 15, 16 and 311 in quite a large number of cases. These questions require for their determination not only judicial approach but also knowledge and expertise in this particular branch of constitutional law. It is necessary that those who adjudicate upon these questions should have same modicum of legal training and judicial experience because we find that some of these questions are so difficult and complex that they baffle the minds of even trained judges in the High Courts and the Supreme Court."

26. We are fortified in our view above from a different angle also and that is doctrine of necessity. The doctrine of necessity has to be invoked to affirm the jurisdiction and not to avoid. In this connection it is relevant to refer a decision of the Division Bench of this Court in Dr.Subramaniam Swamy Vs. J.Jayalalitha and Others (I.L.R. (1994) 2 Madras 935). In the said case the appellant had sought for an enquiry on his petition filed before the Governor under Article 192 of the Constitution of India to disqualify the first respondent in terms of Article 191(1)(e) of the Constitution of India, for the reasons stated therein. The first respondent had filed a writ petition before the learned single Judge raising the plea of bias against the then Chief Election Commissioner Mr.T.N.Seshan, and to restrain the Governor from forwarding the application to the Election Commission of India, and the said plea was accepted by the learned single Judge, and writ was issued as prayed for. The same was appealed against and the Division Bench has disposed of the writ appeal by its judgment dated

15.11.1993, directing the enquiry by the Election Commission, but sans the participation of Mr.T.N.Seshan on the ground of bias. The matter ultimately landed in the Supreme Court in Election Commission of India and Another Vs. Dr.Subramaniam Swamy (1996 (4) SCC 104), and the Supreme Court held that in as much as the Election Commission consists of the Chief Election Commissioner and 2 other Election Commissioners, should there be concurrence between the two Election Commissioners, the matter may be decided accordingly, but there is no such concurrence and the opinion is divided, then Mr.T.N.Seshan, who was the Chief Election Commissioner was entitled to adjudicate upon the matter even if the plea of bias was made out. We feel it apt to extract the findings contained in paragraphs 16 and 17 of the above judgment, which are relevant in this context. Para-16 : We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choice is between allowing a biased person to act or to stifle the action altogether, the choice must fall in favour of the former as it is the only way to promote decision-making. In the present case also if the two Election Commissioners are able to reach a unanimous decision, there is no need for the Chief Election Commissioner to participate, if not the doctrine of necessity may have to be invoked.

Para-17: We think that is the only alternative in such a situation. We are, therefore, of the opinion that the proper course to follow is that the Chief Election Commissioner should call a meeting of the Election Commission to adjudicate on the issue of disqualification of Ms.J.Jayalalitha on the grounds alleged by Dr.Swamy. After calling the meeting he should act as the Chairman but then he may recuse himself by announcing that he would not participate in the formation of opinion. If the two Election Commissioners reach a unanimous opinion, the Chief Election Commissioner will have the opinion to communicate to the Governor. If the two Election Commissioners do not reach a unanimous decision in the matter of expressing their opinion on the issue referred to the Election Commission, it would be necessary for the Chief Election Commissioner to express his opinion on the doctrine of necessity. We think that in the special circumstances of this case this course of action would be the most appropriate one to follow because if the two Election Commissioners do not agree, we have no doubt that the doctrine of necessity would compel the Chief Election Commissioner to express his views so that the majority opinion could be communicated to the Governor to enable him to take a decision in accordance therewith as required by Article 192(1) of the Constitution.

27. In view of what is stated supra, we hold that the present Vice Chairman of the State Administrative Tribunal is entitled to adjudicate the disputes relating to service matters of the State including that of the constitutionality of Statue or Ordinance or Rules, as the case may be.

28. But, Ms.Vaigai, learned counsel draws our attention to yet another Judgment of the Supreme Court reported in 1997 (10) SCC 663 (Union of India and another Vs. P.Sathikumarn Nair and Others), in which a writ petition relating to service dispute was entertained directly by the Supreme Court. The said Judgment is inapplicable as the writ petition was entertained directly by the Supreme Court under Article 32 of the Constitution of India, and Section 28 of the Administrative Tribunals Act excludes the jurisdiction of the High Court, but not of the Supreme Court, and it is so expressly and specifically stated.

29. In view of what is stated supra, we hold that these writ petitions are not maintainable without exhaustion of the remedy before the State Administrative Tribunal. However, having regard to the magnitude of the problem and the urgency involved, should any cause be espoused before the State Administrative Tribunal, the State Administrative Tribunal shall adjudicate the dispute, as early as possible. It shall also be open to the aggrieved parties to file application before the appropriate authority indicated under the impugned Ordinance for revocation of the punishments inflicted on them and if any such applications are filed, they shall be disposed of by the State Authorities not later than one month from the date of receipt of such application, by affording reasonable opportunity.

30. Insofar as, the argument touching upon the Article 20 of the Constitution is concerned, we do not see any infraction of the fundamental right guaranteed in Clause (1) there of, as no new offence has been created under the impugned Ordinance. The Act, which came into effect on 1.10.2002, in its Sections 4, 5 and 6 already described the conviction and punishment for the striker, instigator and the financier respectively. We have adjudicated upon this aspect, as it falls beyond the sphere of service law.

31. Coming to the arrests, doubtless, bail petitions have to be filed as the offences are cognisable and non-bailable, but that is in ordinary cases. In a matter like this, where more than 2000 persons have been arrested and the offences being quite different than usual offences like the one in Indian Penal Code, the offences under the Act, cannot be viewed with such severity, at least in the context of enlarging the arrested personnel on bail. In fact, the learned Advocate General submitted that whoever has filed bail applications have been let off on bail, but still as on date 2046 persons are lodged in jails for the last 12 days. Total detentions are 2211, out of which 74 were ladies and as on date only 165 male and 7 female personnel have so far have been enlarged on bail, and that shows the pathetic condition of the arrestees. Among the arrestees the official cadre are less, while ordinary staff of clerks and sub-staff are more in number. The sub-staff includes the attenders and sanitary staff including sweepers. It will not be unreasonable to presume that the personnel who were languishing in jail for 12 long days for the offences of this nature, who can□t be called criminals stricto senso,

are totally dejected having last their source of livelihood and there may be several reasons disabling them from filing bail applications including the financial aspect. We have already expressed that this Court not only a court of law but the court of justice too, and court of justice does not mean anything if it is not tempered with mercy. For that reason we dispense with the formalities of filing bail petitions and direct the respective jail authorities to forthwith release all the arrested persons who are in judicial custody, in connection with the offences charged under Sections 4, 5, and 6 of the Tamil Nadu Essential Services Maintenance Act, 2002 on taking personal bonds for Rs.1,000/- each. This order shall be communicated by the Registrar General of this Court by a Special Messenger to the Chief Secretary to the State of Tamil Nadu, who shall in turn direct all the jail authorities in the State of Tamil Nadu to comply with this order forth with. We would be happy to see all the arrestees out of jail by the dawn of Saturday i.e., 12.07.2003.

32. In the result, the writ appeal and all the writ petitions are disposed of accordingly. No costs. Consequently, connected W.A.M.Ps. and W.P.M.Ps. are closed.

Internet : Yes

sm/js

Copy to
1. The Government of Tamil Nadu, Rep. By the Chief Secretary to Govt., Fort St.George, Chennai □ 9.

2. The Secretary to Government, Public and Administrative Reforms Department, Fort St.George, Chennai □ 9.

3. The Secretary to Government, Public Department, Fort St.George, Chennai □ 9.

4. The Secretary to Government, Home Department, Fort St.George, Chennai □ 9.

5. The Secretary to Government, Law Department, Chennai □ 9.

6. The Director General of Police, Mylapore, Chennai □ 4.